No. 2508

United States Circuit Court of Appeals,

For the Ninth Circuit, District of California

THOMAS ANDREWS, alias THOMAS J. MURPHY, and GEORGE POOLE, alias GEORGE MOORE,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF OF PLAINTIFFS IN ERROR.

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(a) STATEMENT OF THE CASE

Plaintiffs in Error in this case, together with one Chang Kaw and Charles Benton, were by the United States grand jury indicted in October, 1913, charging that on May 1, 1913 defendants confederated together unlawfully in San Francisco for the purpose of committing a crime against the United States. The indictment charges two distinct and

separate counts. In the first count it is charged that the defendants conspired to commit a crime against the United States, to wit, that of importing opium from Old Mexico into the United States by way of El Paso, Texas, to San Francisco, California. The second count, after alleging in general terms a conspiracy to commit a crime against the United States, charges that the defendants confederated and conspired together for the purpose of unlawfully transporting and concealing contraband opium theretofore unlawfully brought into the United States from Old Mexico by way of El Paso to San Francisco. In both counts of said indictment four identical, distinct and separate overt acts on the part of these defendants are charged in furtherance of the conspiracy alleged in each count. The first overt act charged is the bringing of two trunks from El Paso to San Francisco by way of Trinidad, Colorado; the second is the delivery of smoking opium to Chang Kaw at 30 Waverly Place, San Francisco; the third is the taking of two trunks used by the defendants for smuggling opium from the home of Charles Benton, 1346 A Stevenson Street, San Francisco, and leaving the same with one William Roberts in said city; the fourth is the purchase by Thomas Andrews, alias Murphy, of a certain railroad ticket from Trinidad, Colorado to San Francisco for $44.20, and also the payment by him of $17.02 as excess on baggage alleged to have contained contraband opium. In both counts of the indictment the alleged conspiracy shows its inception on May 1, 1913, and that at that time the

defendants conspired, confederated and came together with the intent to commit this offense against the United States, and continuously thereafter and in furtherance thereof the four overt acts mentioned are alleged to have been committed.

Defendants pleaded "not guilty" at the time of their arraignment and at said time were not represented by counsel. On November 22, 1913, after trial the jury found defendants guilty on both counts as charged in said indictment. On December 10, 1913, after motions for new trial and in arrest of judgment were denied by the Court, sentence was imposed as follows: Two years on the first count and one year on the second count, the sentence on the second count to commence after the expiration of the first sentence, a total of three years in San Quentin prison.

On November 2, 1914, this court dismissed plaintiffs' writ of error for failure to properly prosecute the same pursuant to Subdivision 1, Rule 16, of the Rules of Practice of this court. Thereafter, on November 19, 1914, this court set aside its original order and reinstated the cause, on the same day granting thirty days from said date for plaintiffs in error to file and docket a certified transcript of the record. Present counsel were associated and took part in said application for re-hearing on November 19, 1914, and since have been substituted as the sole counsel for the plaintiffs in error in the place and stead of counsel trying the case.

(b) SPECIFICATION OF ERRORS.

Plaintiffs in error have in their assignment of errors (Tr. pp. 233-240) as heretofore filed herein, enumerated the errors which they urge, and which we here re-allege, and we particularly specify and urge as error in this cause the following:

1. That the District Court erred in overruling defendants' motion, made prior to trial, to allow the defendants, these plaintiffs in error, to withdraw their pleas of "not guilty" for the purpose of interposing a demurrer to the indictment herein, which said pleas of not guilty were entered at a time when defendants were not represented by counsel. And it is herein urged that the said indictment is defective and fails to state an offense against the laws of the United States.

2. That the verdict is not supported by the evidence, and said verdict and judgment thereon are contrary to law.

3. That the Court committed manifest error affecting the substantial rights of these defendants during the trial of the case relative to the admission of certain evidence which was duly and regularly excepted to by counsel for defendants.

4. The Court erred in denying defendants' motion that said Court instruct the jury to acquit defendants at the time when the government first rested its case, and in refusing to permit counsel

for defendants to argue to the Court that said instruction be given to acquit on the ground of failure of evidence to prove the charges set forth in the indictment.

5. That the Court erred in instructing the jury as to the law applicable to this case, and as follows:

> "The act further provides that whenever on trial for a violation of this section the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain possession to the satisfaction of the Jury." (Tr. 193)
>
> "If you find that contraband opium was in the possession of the defendants, or either of them, in pursuance of a conspiracy, that fact is sufficient to establish the overt act of having such opium in his possession, unless explained by the defendant." (Tr. 196).

6. That the said Court committed manifest error affecting the substantial rights of these dedendants in denying their motion for a new trial and in arrest of judgment, on the ground of newly discovered evidence, and in the assignment of errors heretofore filed herein the defendants referred to and made a part of said assignment all the records, evidence and proceedings, together with the affidavits filed in said cause.

(c) ARGUMENT.

1. The Indictment.

The first alleged error on the part of the court below which is here urged is relative to the denial by the said court of defendants' motion to be allowed to interpose a demurrer to the indictment, as said defendants had pleaded "not guilty" before any counsel appeared in their behalf. (Tr. pp. 14-15). It is a well settled rule of law and procedure that the court has discretionary power to pass upon a motion allowing the withdrawal of a plea under the circumstances occurring below, for the purpose of allowing counsel to interpose a demurrer to the indictment, and if that discretionary power has been abused this court can take cognizance thereof. We maintain that the error in refusing this motion was a very material and substantial one, for the reason that the defendants were charged with the commission of a felony, and were about to be tried for the same. The question as to what the particuler crime was which the defendants were charged with should have been settled in order that the defendants might have prepared a proper defense and have been allowed to interpose the same. Section 5440, Rev. Stat. is as follows:

> "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more

> than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

We will now proceed with an analysis of the indictment. The first count charges a conspiracy on the part of the defendants with others unknown to bring opium into the United States from Mexico by way of El Paso to San Francisco. (Tr. p. 2). The second count also charges a conspiracy by the same defendants to transport, conceal and sell opium after importation, knowing it to be contraband. (Tr. p. 5). Then follow the identical four overt acts in both counts, and in support and furtherance of the alleged conspiracy charged in both counts. The law relative to importing and dealing in opium is Section 8801, as set forth in the U. S. Compiled Statutes, 1913, and is as follows:

> "If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such

> opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." (35 Stat. 614).

A careful study of the indictment shows that it attempts to set up and charges a violation of Section 5440 aforesaid, and does not charge the offense comprehended in Section 8801. There is a very great distinction between the two sections, and just here we maintain the error lies both on the part of the prosecution and of the court below. Both counts charge that all agreements to violate the laws of the United States by these defendants, Andrews and Poole, were continuous from and after May 1, 1913; that they had their inception on said date in San Francisco, California. If this be so and the entire offense is a continuing one under said Section 5440, then we maintain that there is but one crime, if any, namely, that of a conspiracy with four alleged overt acts in furtherance thereof. And if this be the true charge, and there be but one conspiracy, how can it be maintained that two counts are permissible, both charging a conspiracy to commit a certain crime, and neither count charges any crime whatsoever under Section 8801. Consequently the indictment is defective and duplicitous.

Again, had there been charged first a conspiracy and four overt acts in furtherance thereof, and the second count set out the direct offense by these defendants of violating Section 8801, there is no question but that the indictment would be proper under

the law. There is no question but that various offenses of a similar nature may be charged in separate counts in one indictment,—for instance, as was held in U. S. v. Lancaster et al., 44 Fed. Rep. 885, in which the rule is announced that counts charging a conspiracy and also the offense committed in pursuance thereof may be joined where both offenses are similar in nature and in mode of trial and punishment. Sec. 1024 of the U. S. Statutes provides as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the Court may order them to be consolidated"

and is decisive on this question of charging various offenses of similar kind in the same indictment. In the indictment before us, however, if any crime is alleged it is one only, for the gist of the offense, if any, is an alleged felonious agreement and conspiracy made in San Francisco May 1, 1913, and a continuation thereof evidenced by the four overt acts set out.

Again, it is possible under the indictment before us, that practically two conspiracies are alleged, and in furtherance of each one the identical four overt acts are charged and proof introduced in-

discriminately in support of both charges set forth in the two counts, and not only that, but the sentence is imposed after a verdict of guilty is found, and by a cumulation of punishment three years' sentence is imposed on these plaintiffs in error, when the conspiracy statute itself provides a sentence of but two years, and no more. We will advert to this fact later in our brief.

Therefore, for the reasons hereinbefore set forth, we maintain the indictment is defective, and that this warrants a reversal of the case by this Court.

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2. Evidence is Insufficient to Support the Verdict.

A conspiracy may be defined broadly as a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means.

Commonwealth v. Hunt, 4 Mete. (Mass) III;
38 Am. Dec. 346;
U. S. v. Wooten, 29 Fed. 702;
Hedderly v. U. S., 193 Fed. 567;

In order to convict on the charge of conspiracy there must be shown:

1. That a conspiracy existed as charged in the indictment.

2. That if such conspiracy existed, the overt act charged was committed in furtherance of

such conspiracy.

3. That the defendant was one of the conspirators.

U. S. v. Cassidy, 67 Fed. 702;
U. S. v. Newton, 52 Fed. 280;

In discussing the crime of conspiracy the Court says in Dealey v. U. S., 152 U. S. 547:

> "This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a locus pœnitentiæ so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

It is maintained by plaintiffs in error that there is absolutely no evidence anywhere in the record showing that either Murphy or Poole were in San Francisco on May 1, 1913, or at any time during the month of May 1913, or that they ever at any time or place conspired together to import contraband opium. There is some evidence that Andrews, alias Murphy, was in Oakland June 20, 1913 (Tr. p. 146), but nothing is shown as to Poole being here or that there ever was a plan by these two with one another or with any other persons to import opium. The evidence shows that Poole received certain cases in Nogales, Mexico (Tr. pp. 72, 78), but it is also shown in the affidavit of George G. Sauer on motion for new trial (Tr. pp. 210-211), that the cases referred to were taken into the interior of Mexico

pursuant to instructions. There is no question in our minds but that the inference left with the jury at the time of the trial and when this evidence was introduced through the witness Manzo, was, that the alleged opium supposed to have been transported by Murphy from Trinidad to San Francisco was the same alleged to have been in the cases in Old Mexico. There is absolutely no evidence at any time shown in this case that the alleged, or any opium, ever was imported or carried across the line from Mexico, and the only cases alleged to have contained opium mentioned in the evidence are conclusively shown to have been sent from Nogales, Mexico, to the interior to Cananea.

There is no evidence, nor a scintilla of evidence, that either Murphy or Poole was in San Francisco in May 1913, and there is no proof nor any evidence of the fact of importation of opium; therefore, how can it be said that these defendants were guilty of a conspiracy to import opium and to traffic in the same in the United States, and particularly in San Francisco? There is no question but that there must be at least two elements to make out this crime of conspiracy: there must be the confederation or conspiring and there must also be the overt act. Now, under the first count the overt act charged is the bringing of opium into the United States from Mexico. And we maintain that there must be proof that there was an overt act in furtherance of and to carry into effect the object of the conspiracy. It requires more than proof of mere passive cognizance of a crime on the part of a de-

fendant to sustain a charge of conspiracy to commit it, and the jury must find that such prisoner did some act or made some agreement showing an intention to participate in some way in such conspiracy.

U. S. v. Howell, 56 Fed. 33;
Bannon v. U. S., 156 U. S. 464;
U. S. v. Barrett, 65 Fed. 62.

Can it reasonably be said in this case from the evidence adduced during the trial that there was any agreement between these two defendants at any time or place, and particularly during the month of May 1913, when the evidence shows that the first time either of these defendants was in or near San Francisco after May 1, 1913, is on June 20, 1913, when Murphy registered under the name of "Spencer" at the Hotel Crellin, in Oakland? (Tr. p. 146). Further, assuming, for the purpose of the argument, that the defendants were guilty of the crime of conspiring together to unlawfully import opium, could the penalty under the indictment be more than two years? It is shown in the judgment on verdict of guilty filed in this case on December 10, 1913, (Tr. p. 229), that the defendants were duly convicted of the crime of CONSPIRACY to import, receive and conceal opium.

As a resume' for the benefit of this Court and for the purpose of arranging in a comprehensive and systematic manner the evidence adduced by the government on the trial of this case, we herein show what witnesses were introduced, the evidence

of each that affected the defendant Andrews; that which affected Poole; and that which affected both. The pages of the transcript on which said evidence is found are as follows:

Evidence affecting Thomas Andrews:

Harry F. Walsh,

	Tr. page
Direct Examination	15
Cross	27
Redirect	28

Joseph Head,

Direct	28
Cross	44
Redirect	50
Recross	52
(Recalled)	97
Redirect	102
(Recalled)	113

Fred West,

Direct	55
Cross	56
Redirect	63
(Recalled)	134
Cross	135

John H. Dawson,

Direct	68
Cross	69

Chas. R. Miller,

Direct	91
Cross	94
Redirect	96

George Cassidy,

Direct	104
Cross	106

As we have hereinbefore stated, Andrews, alias Murphy, is shown to have been at the Hotel Crellin, Oakland, June 20, 1913. It may also be gathered from certain circumstantial evidence adduced during the trial that he came from Trinidad to San Francisco in September 1913. There is no proof that he had contraband opium in his baggage. The only evidence found is that certain stains analyzed as opium were found in his trunks.

But the error we urge in this portion of our argument is that there is no evidence adduced by the witnesses Manzo and McAlpine that the alleged cases of opium delivered by them to Poole were ever

brought into the United States; on the contrary, their testimony is that they do not know what became of the cases.

In Transcript, on page 76, we find the following testimony:

> Mr. PRICE. Q. Just one question. What finally became of these cases you testified to as having been turned over to you?
> A. I don't know. ,

Again, the evidence of witness Guillermo McAlpine (Tr. p. 79) shows that certain cases were receipted for by Poole, and thereafter the following question, and answer was elicited (Tr. p. 83):

> Mr. SELVAGE. Q. Do you know where these cases went to after they left your bank?
> A. No, I do not know.

These two witnesses are the only ones adduced by the government to produce evidence in support of the first count of the indictment so far as the charge of importing opium is concerned, and this is the gravamen of the conspiracy charged in said first count. With this evidence before them, is it unreasonable to suppose that the jury, knowing that Poole received certain cases in Mexico presumably containing opium, asumed that he brought the same into the United States, and then that Murphy brought the same to San Francisco? We maintain, however, that while this may be a conjecture, nevertheless, taken with the instructions given to the jury by the court relative to the possession of opium or alleged opium in possession of a defendant unexplained was a presumption of guilt, and we assert

that it may be reasonably believed that the jury had as a result of the uniting of these two factors, a resulting conviction in their minds of the guilt of defendants, and that such conviction was erroneously conceived by said jury. There is absolutely no connection made with Murphy as to these cases turned over to Poole in Mexico, and on the motion for a new trial, as we have already in our argument stated, the affidavit of George G. Sauer heretofore mentioned conclusively proves, in our oipnion, that these particular cases were sent to Cananea, Mexico, by Poole. However, we maintain that once this idea is fastened in the mind of the jury that the cases alleged to contain opium in Mexico were brought into the United States, and then certain stains found in Murphy's trunks, together with all the remaining circumstances adduced by the government in this case and the application of evidence adduced indiscriminately during the trial and over the objection of defendant's counsel and otherwise, could produce but one result, viz., that of the guilt of these defendants on both counts. Our objection goes to the root of the entire case, namely, the overt act of importing these particular cases received by Poole in Mexico, pursuant to a conspiracy on the part of these defendants; but if it is not shown by any evidence that those cases ever crosed over into the United States, how can there by any possible chance be a lawful conviction on the first count? Further, if this particular proof is not made of importing opium and bringing the same across the

line into the United States from Mexico, then all the evidence introduced as to the acts of Murphy, or Andrews, and all the evidence tending to connect these particular defendants with the supposed opium alleged to have been delivered to Poole in Nogales, Mexico, is not connected up, then we maintain there is no ground upon which there can be a conviction predicated upon the verdict brought in by the jury, and particularly when we apply the test under the three particular specifications under this Section 2 originally set out. The verdict is not supported by the evidence and is contrary to law.

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4. Errors of the Court in Admitting and Rejecting Evidence duly Excepted to.

In our assignment on this ground of alleged error on the part of the Court below we now set out the particular testimony and the refusal by the Court to strike out any of the same, and as is shown, commencing on page 115 of the transcript; the first testimony being that of Mr. Head, Inspector in the service of the United States Government. It was sought by his evidence to introduce certain documentary evidence purporting to have been written by Murphy, and the following testimony was introduced (Tr. p. 114):

> Q. (Being cross examination conducted by Mr. Price) Then you do not say positively that this is Mr. Murphy's handwriting, or this is Mr. Murphy's handwriting; you simply state there is a general similarity; is that what you mean to say?

A. Well, I express it a little stronger; there is a marked similarity, marked characteristics.

Q. And you base that simply upon these bits of stuff you picked up; is that corect?

A. Yes, sir. (Tr. p. 115).

Q. The stuff you have concluded to be in Mr. Murphy's handwriting?

A. Yes, sir.

Q. You base that then upon statements of the conclusion which you have come to; is not that correct?

A. Yes, I make the statement on the conclusions I have arrived at after looking at these different samples of the writing.

Q. Have you ever seen Mr. Muphy sign his name?

A. No, sir.

Mr. SELVAGE. I offer these in evidence and ask to submit them to the jury to examine them and to note the characteristics of the handwriting.

Mr. CAMPBELL. If your Honor please, we object to the introduction of these matters at this time upon the ground that it is immaterial, irelevant and incompetent, and that so far there has been no foundation laid for them and that the corpus delicti of this charge laid in the information has not been established.

Mr. DANFORD. And the witness admits he never saw the handwriting of Murphy.

The WITNESS. No, sir, I take exception to that.

The COURT. He said he never saw him write.

The WITNESS. Yes, your Honor, that is it.

The COURT. The witness who left the stand (Tr. p. 116) testified that Murphy

wrote his name in the register, "Spencer."

Mr. DANFORD. Then that would be the witness to put this in under, if at all. This witness does not know the handwriting, of his own knowledge.

The COURT. No, of course he does not.

Mr. DANFORD. We submit then that the foundation is not laid.

The COURT. Sure the foundation is laid because the witness has testified that he compared this writing with the writing in dispute and gives his opinion as to whether or not it is written by the defendant. The objection is overruled.

Mr. DANFORD. Very well, your Honor.

Mr. SELVAGE. I will submit the signature on the ticket and the name "Juarez" in the book, on this page, the capital J's.

Again, (Tr. p. 118) in the testimony of Louis Sang, the prosecution was attempting to introduce certain correspondence received by Sang from one Walker, who was identified by Sang as being Murphy, or Andrews. The testimony at this point is as follows:

Mr. CAMPBELL. If your Honor please, I desire to interpose the same objection to these letters being read to the jury at this time or introduced in evidence upon the ground that they are immaterial, irrelevant and incompetent and that the proper foundation has not been laid, and that the corpus delicti has not yet been established.

The COURT. The objection is overruled.

Mr. DANFORD. We note an exception.

Further on on the same page, after discussion of a letter, the evidence follows:

The COURT. You had better learn it. The letter which he says was received from the defendant Murphy under the name of Walker may be admitted in evidence.

The COURT. This letter was received from Walker. Let me see it. Is there anything in it bearing on this case? Oh yes, read it.

Mr. SELVAGE. It reads: (Tr. p.119):

"El Paso, Texas, May 19,'13.

Friend Louie: Your friend Fong Chin in Juarez spoke to me in regard to a letter he received stating that you want to see either George or myself about handling some goods for you out of Guaymas, Mexico by boat. Things are in bad shape around Guaymas as there is no goods coming out of there by railroad and your boat route may be O. K. The railroads are all tied up south of Chihuahua City and there has not been any shipments of goods in Jurarez for about three weeks. I just returned from a stop in New York City, and George has left. Before I arrived he left. He left word he would be back in about a week, so if you still want to go through with that proposition let me hear from you at your earliest convenience and I will come to San Francisco and talk the matter over. I am,

Very truly,

Tom."

Address, Thomas Walker, Texas, 210½ Broadway, El Paso.

Mr. DANFORD. (Tr. p. 120) Now, if your Honor please, I move to strike out the reply as to what this business referred to. He answered "opium." I move to strike that out upon the ground that there is no foundation laid and nothing to show in the instrument itself, which would be the best

evidence of that it would refer to.

The COURT. It does not show, and therefor the failure to show may be supplied by parol proof, which is done here by saying he referred to opium as the goods he desired to have handled. The motion will be denied.

Mr. DANFORD. Exception.

Testimony of John W. Smith, a witness for the prosecution, (Transcript p. 159):

Mr. SELVAGE. Q. State whether or not you have had possesion of a memorandum-book, a small red memorandum-book, or a black one, rather.

A. Yes, sir.

Q. Where did you get it?

A. I got it in the drawer of room 22, at the Alcazar Hotel, which was occupied by Mr. Poole.

Q. State whether or not there are any addresses in that book.

A. There is an address there of 30 Waverly Place; there is also another address, 112 East Washington Street, Stockton, which is the Foo Lung address, of which Louis Sang was the manager.

Mr. PRICE. We object to that, your Honor. The witness is called to read an address from a book and he is now making a statement entirely aside from that. We ask that that go out.

Mr. SELVAGE. I want to know who these people are, if he knows, and he has answered.

The COURT. The motion will be denied.

Testimony of Mr. P. O. Huffaker, on behalf of the prosecution (Transcript p. 173):

Mr. PRICE. We object to anything being

admitted in evidence not connected with the defendants and not connected with the corpus delicti in this case.

The COURT. The objection is overruled.

Mr. PRICE. We note an exception.

We advert now again to our argument on the point concerning the importation of those certain cases alleged to have contained opium which it was shown were turned over to Poole in Nogales, Mexico, and we argue that if there is no connection shown on the part of these defendants with the actual importation of those particular cases across the line into the United States in furtherance of a conspiracy between these defendants, then all of the evidence which we have here set out and which was excepted to and the introduction of which was excepted to by counsel for defendants during the trial, should be entirely stricken out, and if the same is stricken out, then we maintain there is no evidence on which to convict the defendants in this case, on either count.

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4. Refusal by Court to Instruct Jury to Acquit.

The indictment charges in both counts that a conspiracy existed between these defendants. The presumption at the commencement of trial is, that defendants are innocent. The prosecution must establish its case against the accused. The evidence must be conclusive in order to convict. The gravamen of the crime charged is the conspiracy, and it must be proven that opium was brought into the United States in furtherance thereof in order to support the first count of the indictment herein. It

must be shown that the alleged opium at Nogales, Mexico, was brought into the United States by these defendants. If no proof of this fact exists, and we assert there is none, then the jury should have been charged that so far as the first count is concerned there was no proof of conspiracy to import opium. As to the motion made by counsel to instruct the jury to acquit in view of the foregoing, particularly as to the first count, there is a substantial and manifest error on the part of the court below and an abuse of its discretionary power. The power of this court exists to examine the evidence to ascertain if there is any evidence to support the verdict. If none exists, it follows as a corrollary that there was abuse of discretion on the part of the court below in refusing to instruct the jury to acquit. The rule covering this particular question has been discussed in Hedderly v. U. S., 193 Fed. Rep. 571. In this case the court in its opinion cites Wiborg v. the United States, 163 U. S. 658, relative to the examination of evidence in a case and the extent to which this court or an appellate court will go in examining evidence. In this case the court says:

> "No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to

defendants, we feel ourselves at liberty to correct it."

There is no evidence that the alleged opium from Nogales was imported into the United States, as we have already fully discussed. We insist further that the conspiracy and the overt act must be alleged and proven.

Bannon v. U. S., 156 U. S. 464;
U. S. v. Howell, 56 Fed. 21;
Pettibone v. U. S., 148 U. S. 197, 202.

"Where an indictment under Revised Statutes Sec. 5440 for a conspiracy to commit the offense created by Section 10 of the Interstate Commerce Law as amended by Act March 2, 1889, charges a conspiracy between lumber merchants and their servants and an employee of a railroad company to procure less than the established rates by falsely weighing the lumber shipped, such weighing being done by the railroad employe, the jury, in order to convict must find an agreement between two or more of defendants for the purpose named, and also as an overt act, the actual false weighing of lumber by such employe."

U. S. v. Howell, 56 Fed. 21.

Applying the theory of the foregoing citation to the case before us, in discussing this particular question, there is no evidence that such an agreement between the defendants did exist. If such agreement did exist, the overt act consisted in bringing opium from Mexico to the United States, and we must conclude that the jury believed that the opium at Nogales eventually came into the United States, and was the same represented by the stains

found in the trunks of one of these defendants.

There is another aspect of this matter we might discuss concerning the evidence in this case, and relative to the point under discussion, and we now touch upon the question of a variance between the charges in the indictment and proof to sustain such charges.

> "Where the indictment charged a conspiracy to defraud one R. H., a married woman, of a certain promissory note, proof that the note was the property of the husband and not of the wife was fatally variant."
> Commonwealth v. Manley, 29 Mass. 173.

If there was an overt act it must have centered around the cases alleged to have contained opium at Nogales, and we must conclude that the jury did decide that said cases at Nogales contained the opium referred to in the indictment, the importing and concealing of which constituted the overt act. If so, and we see no other hypothesis on which the jury predicated its verdict, then under the theory suggested in the decision just quoted the variance was fatal. Counsel for defendants were precluded from arguing to the court that there was a variance when the court refused to allow argument on the motion to acquit, and therefore we here urge reversible error.

When during the trial the question was raised as to what the defendants were obliged to defend against in the way of meeting the charges in the indictment, the court intimates that the only defense to be interposed was to defend from El Paso, Trin-

idad, or some other point of that sort(Tr. p. 73. Therefore, if there was no evidence before the jury relative to the proof of the consummation of the alleged conspiracy charged in the first count of the indictment to import opium from Mexico, and further, if there is a variance between the charges of the indictment and the proof with testimony indiscriminately presented as to all the charges in both counts without any clearly defined application as to either one count or the other, then the court committed manifest error in refusing to allow the matter to be argued as to whether or not an instruction should be given to the jury to acquit.

> "Where there is not sufficient evidence against a prisoner he is entitled to a verdict of acquittal should he demand it."
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> Bishop's New Criminal Procedure, (1913) Vol. 2, Sec. 820.

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5. Error of the Court in Instructions to the Jury.

We quote from the charge to the Jury given by the Court below:

> "The Act further provides, that whenever on trial for a violation of this section the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain possession to the satisfaction of the jury." (Tr. pp. 193, 240).

And again, page 196 of the transcript:

> "If you find that contraband opium was in the possession of the defendants or either of them, in pursuance of a conspiracy, that fact is sufficient to establish the overt act of having such opium in his possession unless explained by the defendant."

Under the circumstances these instructions given by the court below to the jury are sufficient in themselves to warrant a reversal of this case. The charge in the indictment is a conspiracy, as we have already fully argued. And as we have already stated in our argument, it evidently was the theory of the government in trying this case from the very beginning in the preparation of the indictment, and in the introduction of testimony indiscriminately on both counts of the indictment, that they were laboring under the opinion that the defendants were being tried for the crime of conspiracy to import opium and also for the crime of unlawfully transporting, concealing and selling opium. This impression seems also to have communicated itself to the court, as is evidenced by these particular instructions given to the jury. And it can be readily seen that where the evidence shows so clearly that evidently certain cases, containing opium were delivered to Poole, one of the defendants, in Nogales, Mexico, and the defendant Poole not explaining the possession of the same or what was done with the same, the natural inference would be that this opium crossed the line into the United States, was taken from El Paso by Murphy, or Andrews, as he

is known, by way of Trinidad to San Francisco. And we maintain that it is a most serious error on the part of the court to instruct this jury that unless these defendants explain the possession of opium, or alleged opium, in a satisfactory manner, that it is a presumption that they are guilty as charged in the indictment. There is no question in our mind but what had there been two particular counts alleged, one for the conspiracy and one for transporting, handling and dealing in contraband opium, that the charge herein referred to and set out as given by the court to the jury might have been a proper one. But we maintain that having been given in the manner, under the circumstances, and relative to the law as it is supposed to be, and without reference to a close and careful analysis of the indictment in this case, that this one particular point is sufficient for a reversal in itself.

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6. Error of Court in Denying Motions for New Trial and in Arrest of Judgment.

In our final specifications of error on the part of the court below, we desire to draw the attention of this court to the following portions of the transcript:

Notice of motion for a new trial (Tr. pp. 207-209);

Affidavit of George G. Sauer (Tr. pp. 210-212);

Affidavit fo Paulino Fontes (Tr. pp. 212-213);

Affiidavit of Louise Lorraine (Tr. pp. 216-217);

Motion in arrest of judgment (Tr. pp. 222-226);

Minutes of Court (Tr. p. 227);

Exception to the ruling of the Court (Tr. p. 227).

We have heretofore in our brief discussed various errors assigned and urged, and will not again traverse the grounds already covered, nor will we burden this court with unnecessary prolixity of argument. The motion for a new trial is based principally on the affidavits cited. The two of Sauer and Fontes respectively indicate the probability of the defendants being able to introduce these two witnesses in their behalf, should an opportunity be presented to do so. The question first arises, was this testimony available and could it have been obtained with reasonable diligence on the part of the defendants at the time of their trial, and is it sufficient to produce probable proof sufficiently strong to in any way change the result of the verdict of the jury. We realize that unless this be so, the proposed evidence of these two witnesses is of no value. We take the view that it would materially affect the case, for the first count charges the conspiracy to import opium, and if the alleged opium at Nogales turned over to Poole was taken to Cananea and by Poole disposed of there, then there is absolutely no question that all subsequent evidence predicated upon the fact that these particular cases contained opium and that the said opium was brought into the United States is irrelevant and incompetent, and

there should be an opportunity given to instruct a jury on this point. Can it be said that they would still find after an instruction in this regard that the defendants were guilty on the first count, or at all, of the commission of the crime they have been charged with in the indictment? Upon this hypothesis, together with the instructions of the court, which we claim were erroneously given and heretofore by us discussed, should not the court have granted the defendants a new trial on motion made by counsel for defendants upon the grounds specified and when supported by these particular affidavits? We respectfully suggest that a new trial should have been granted.

There is also the testimony of Louis Sang (Tr. pp. 116, 124, 173). On examination of this witness Sang in behalf of defendants, it appears that prior to his taking the witness stand he is alleged to have stated to Mr. Price, one of the attorneys for defendants, that his dealings with the said defendants were in 1909. A very serious question arises in our minds as to the truthfulness of this particular witness, and the query naturally arises, did he tell the truth, and if he testified falsely in one respect, was he not testifying falsely in other respects?

We believe that due consideration should be given to this particular point of our argument relative to his reliability and the probable effect and influence of his testimony on the jury.

These points which we have raised herein and our own conclusions after a careful study of the case, incline us to assume that there is such manifest error affecting the substantial rights of said defendants, that the Court below should have granted a new trial. In conclusion we believe that the errors we have indicated are of such a nature that each, every and all of them are reversible errors, and that under the circumstances of this case, its serious nature, the indictment, evidence introduced, rulings of the Court, its charge to the jury, verdict, judgment and sentence, are such, that in fairness to the defendants, plaintiffs in error, there should be a reversal by this Court in this case.

Respectfully submitted,

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in Error.